SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

□

No. 66

WESLEY WILLIAM COX
Petitioner
v.
THE UNITED STATES OF AMERICA

□

No. 67

THEODORE ROMAINE THOMPSON
Petitioner
v.
THE UNITED STATES OF AMERICA

□

No. 68

WILBUR ROISUM
Petitioner
v.
THE UNITED STATES OF AMERICA

□

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

HAYDEN C. COVINGTON
Counsel

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

□

No. 66

WESLEY WILLIAM COX

Petitioner

v.

THE UNITED STATES OF AMERICA

□

No. 67

THEODORE ROMAINE THOMPSON

Petitioner

v.

THE UNITED STATES OF AMERICA

□

No. 68

WILBUR ROISUM

Petitioner

v.

THE UNITED STATES OF AMERICA

□

ON CERTIORARI TO
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

MAY IT PLEASE THE COURT:

The main part of the brief of the Government is designed to lure this Court into unconsciously upsetting *sub silentio* its ruling in *Dodez* v. *United States*, 327 U. S. 114, where an identical argument made by Dodez in his Reply Brief was rejected by this Court. In the companion case of *Gibson* v. *United States*, 327 U. S. 114, the Government made the same contention on an almost identical record as here made. It was rejected for the reasons here urged by petitioners. In fact in those two cases the Government made an inconsistent argument. It was said Dodez should be sent back for a new trial while it was urged that Gibson's case should, because of harmless error, be affirmed. The Government's position here is inconsistent with what it said in *Dodez*, which is here quoted. "If the defense of illegal classification is open to petitioner and if this Court remands the case for a new trial, the Government will be afforded the opportunity to determine whether to proceed further with the litigation in view of the new issue in the case. If a new trial is had petitioner will have an opportunity to present squarely the question whether there is any foundation in the facts before the selective service boards for rejecting his claim to classification as a minister, in accordance with the standard of judicial review set forth in the *Estep* case." (Brief for the United States, pp. 16-17, *Dodez* v. *United States*, No. 86 October Term 1946) In the *Dodez* case the evidence was fully developed by receipt of the draft board file and other evidence into the record the same as in these cases. The error for reversal was in the charge to the jury, the same as in these cases.

It is urged that the Court has the same power as it would have in habeas corpus proceedings. This specious argument plainly appears to be a fallacy. Habeas corpus is a civil proceeding. These are criminal actions. In habeas corpus the burden is on the prisoner to prove his case.

Here the burden is on the Government to prove guilt beyond a reasonable doubt. Here there is the presumption of innocence. Here there is a guarantee of trial by jury. The Constitution commanded the trial judges in these cases to submit all questions of fact and mixed questions of law and fact to the jury. The trial judges did neither of these. The Constitution precluded the trial court in each of these cases from instructing the jury to find the petitioners guilty. The trial courts in all cases implicitly instructed the jurors to return verdicts of guilty. The trial courts invaded the province of the juries. It was the exclusive prerogative of the jury to pass on the guilt of the petitioner in each of these cases. They were deprived of their freedom to pass on the issues in the cases. *Sparf* v. *United States,* 156 U. S. 51, 100-103, 106-107.

The Government says because these prosecutions are based on alleged violations of administrative orders, the validity of which depends on whether there is basis in fact for them, that the defense is one of law in each case. It vigorously urges that there can be no question of fact because all questions of fact before the board are made final by the decision of the boards under the Act. This is the same old argument condemned by this Court in *Estep* v. *United States,* 327 U. S. 114, which has been clothed with more deceptively alluring dress and sent slithering back into the Court again. *Estep* held that the classification by the board was final only when there was basis in fact to support it. If a registrant is exempt there is no basis in fact for the action of the board. The final say on such question rests with the courts and not with the boards. Whether one is a minister exempt may be a question of law, one of fact or a mixed question of law and fact depending on the circumstances of the case. If it is one of fact or a mixed question of law and fact then the jury rather than the court must decide.

This Court has said "in reviewing an administrative

order, it is ordinarily preferable, where the issue is raised and where the record permits an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute." *Cardillo* v. *Liberty Mutual Insurance Company*, 67 S. Ct. 801, 804-805. On reviewing a draft board order the inquiry is the same, requiring the court to determine whether there is no basis in fact for the denial of the claim for exemption. *Estep* v. *United States*, 327 U. S. 114. The law "has not left that question exclusively to administrative determination; it has given the courts the final say". *City of Yonkers* v. *United States*, 320 U. S. 685, 689. The nature and scope of review of jurisdictional fact questions in draft cases was fully discussed in the Joint Brief for Petitioners filed in *Smith* v. *United States*, No. 66 October Term 1945 and *Estep* v. *United States*, No. 292 October 1945. The argument there made is here referred to and adopted as a part of this reply brief. See pages 105-131.

It is not a novel proposition of law to permit a jury to pass upon issues first submitted by law to an administrative agency. Especially is this true where, as here, the issue to be determined is the lack of authority of the administrative agency to make the order. Whether there is basis in fact for ordering a minister to do training and service under the Act is a "jurisdictional fact" to be determined by the jury. Similar questions in judicial proceedings to review administrative determinations have been held to be for the jury. *Miller* v. *Horton*, 152 Mass. 540; *Pearson* v. *Zehr*, 138 Ill. 48; *State* v. *Rachskowski*, 86 Conn. 677; *People* v. *McCoy*, 125 Ill. 289. The courts have held that the validity of draft board determinations and orders is properly an issue of fact to be decided by the jury. *Smith* v. *United States*, (CCA-4) 157 F. 2d 176; *United States* v. *Zieber*, (CCA-3) 160 F. 2d 90.

A typical and most common administrative order reviewed by the jury in proceedings brought for judicial

review is that made in workmen's compensation cases. In some states the appeal from an award of an industrial accident commission is to a trial court of general jurisdiction. In such states there are to be found hundreds of decisions by the appellate courts holding that administrative rulings and determinations are questions of fact or mixed questions of law and fact that should be decided by the jury. *Alfredson* v. *Department of Labor,* 5 Wash. 2d 648; *Industrial Commission of Ohio* v. *Warren,* 115 Ohio St. 482; *Roma* v. *Industrial Commission of Ohio,* 97 Ohio St. 247; *Standard Accident Insurance Company* v. *Williams,* (Tex. Com. Appls.) 14 S. W. 2d 1015; *Hicks* v. *Georgia Casualty Company,* (CCA-5) 63 F. 2d 157.

Even where the evidence is undisputed but different minds may reach different conclusions the courts have held that the correctness of administrative determinations may be determined by the jury. *Van Koten* v. *State Industrial Accident Commission,* 110 Or. 574. This is, of course, similar to the rule of this Court holding that it is for the jury to draw the inference from circumstances established by undisputed evidence in actions brought against railroads under the Employers' Liability Act, *Ellis* v. *Union Pacific,* 67 S. Ct. 598; *Lavender* v. *Kurn,* 327 U. S. 645.

Yakus v. *United States,* 321 U. S. 414, is not in point and does not control here. In that case there was no provision for judicial review in the district court. Judicial review was fixed by statute exclusively in the Emergency Court of Appeals. Yakus, like the petitioner in *Falbo* v. *United States,* 320 U. S. 549, had not exhausted his administrative remedies. Here the situation is quite different. Judicial review is available in the district courts since petitioners exhausted their administrative remedies. The court—judge and jury—must perform its functions as in any other criminal case. No other judicial tribunal has been vested with exclusive jurisdiction and therefore *Yakus* v. *United States,* 321 U. S. 414, does not apply. *Monongahela*

Bridge Company v. *United States*, 216 U. S. 177, being a case where judicial review on the ground was not permitted under the Act, is also not in point. The liquor violation cases (*Steele* v. *United States*, 267 U. S. 505; *Ford* v. *United States*, 273 U. S. 593) where attacks made against search and seizure orders were held to be matters of law for the court to decide, are not apposite. The search and seizure violations were not defenses but were legal questions concerning admissability of evidence ruled on by the trial judge. It would have been quite different if the illegal seizure had been an element of the crime or a defense to the charge. Therefore the decisions are not in point.

The case of *Yagg* v. *United States*, 280 U. S. 420, being one where the judicial review was statutory for the purpose of testing an order made within the authority of the agency rather than to determine the lack of jurisdiction of the board, is not controlling here. In these cases the inquiry is to ascertain the basic fact of whether the men were ministers, exempt from training and service, and for that reason there was no basis in fact for the classification given.

The Government has read the mind of Congress and now writes into the Act that which Congress neglected to write! It says that it was intended that the district judge in prosecutions under the Draft Act performs a function like that which Congress remembered to write in the Price Control Act! The trial judge is said to have the same powers and duties in each of these cases as the Emergency Court of Appeals has. That is a new theory. It is an afterthought. Such ex post facto amendment of the law without specific sanction from Congress cannot be accepted. It should be rejected. The district court, of which the jury is a part, has jurisdiction of these prosecutions rather than the district judge. The function of the district judge in these cases is no different from that in any other criminal cases.

The spurious argument of the Government if accepted will reverse the holding of the Court in the *Estep* case.

(327 U. S. 114) The argument is fallacious and factitious. To prove it read: "The board having found the facts, there is no occasion for intercession by the jury." (Government's Brief, page 32) This Court held in *Estep* that the finding of the board was not final in all cases especially where there is claimed to be a want of jurisdiction. Now the Government again holds differently.

In petitioners' cases because they are criminal actions the petitioners have an advantage over the Government. The Government cannot claim the right to an instructed verdict. *United Brotherhood* v. *United States*, 67 S. Ct. 775, 782. Petitioners are privileged to move for an instructed verdict and did so move. They are entitled to judgments of acquittal as a matter of law. The reason is that in each case the undisputed evidence shows they are exempt as ministers of religion. However if this Court finds that different reasonable minds could draw different reasonable conclusions from the evidence before the draft boards then the issue of petitioners' exemption was one of fact or one of mixed fact and law for the jury and the jury alone in each case to decide under appropriate instructions from the judge of the trial court in each case.

The constitutional right of trial by jury to judge the facts has not been removed in draft prosecutions or in any other criminal case. It still remains. Section 11 of the Act provides that those who violate a duty are guilty. Those who have no duty because exempted by Congress cannot be convicted. No duty is imposed until there is a valid classification and order. It is for the jury to find the guilt of one under the Act including the issue of whether there is basis in fact for the classification given. In all cases where the trial court does not grant a judgment of acquittal the jury should be, in every case, permitted to decide if there is no basis in fact for the classification given or other violations of the regulations.

The conceded errors of the trial courts in their instruc-

tions and rulings that the illegality of the draft board proceedings in these cases was not a material defense cannot be cured by a holding of the court of appeals upon trial de novo that the draft board orders were legal. The function of the district court was not performed regardless of whether the issue was one for the judge or the jury. In *Gibson* v. *United States*, 327 U. S. 114, the trial was before the judge without a jury. The jury was waived making the issue solely for the judge. Nevertheless this Court reversed and remanded rather than render the judgment which the Government urged should have been rendered by the trial court.

Because petitioners did not get a judicial trial in the district court on the only contested issue involved which was their only defense, the judgments should be reversed and remanded to the trial courts for further proceedings.

The Government's argument against the ministerial status of petitioners will not be replied to in full. It was anticipated and adequately answered in the main brief. But some isolated arguments deserve reply.

It is contended that Roisum became a minister after registration to evade and dodge the draft. Neither the draft board, the appeal board nor the trial court so found or intimated such. The mere fact that one takes up a deferred or an exempt status like becoming a judge, governor, Congressman, or minister after registration does not prove dishonesty or draft evasion. Legal avoidance of the draft does not constitute illegal evasion of it anymore than legal avoidance of taxes constitutes illegal evasion of taxes. When Roisum changed his status he was entitled to show the board and it was the duty of the board to classify him according to his status when the final classification was given him by the board of appeal.

This conclusion here contended for is supported by the decision of the Seventh Circuit Court of Appeals in the case of *Hull* v. *Stalter*, 151 F. 2d 633. There the facts were

on all fours with the facts in Roisum's case. There Hull —one of Jehovah's witnesses—filed a questionnaire showing he was preaching the gospel as a part-time minister of Jehovah's witnesses and was engaged in secular work as a stenographer for a pottery company in Crooksville, Ohio.[1] Before his final classification he informed the local board that he intended to start in the full-time ministry in September 1941. However, he did not actually begin in his assigned territory until October 1941. On September 18, 1941, the local board placed him in Class I-A-O.[2] In other words, like Roisum, while his case was pending before the board of appeal he changed his status to that of a minister. The Seventh Circuit Court of Appeals held that the District Court[3] was correct in concluding that Hull was entitled to be classified as of the date of his final classification. In that connection the court said:

"There is another question which under some circumstances might be of considerable moment, that is, whether relator's classification should be determined according to his status at the time of his registration or at the time of his final classification. The record before us, however, leaves little room for any contention in this respect. The court in its opinion stated: 'In the argument of counsel at the conclusion of the hearing it was conceded by the government that each registrant is entitled to be classified as of the time the classification is made rather than as of the time he registers, or, for that matter, as of any other time.' The government here contends that this statement by the court was erroneous, relying on an inquiry directed by the court to a member of the Indiana Selective Service System and the latter's response thereto. We agree that this response

[1] See pp. 127, 131, 135 of printed record in Hull v. Stalter, No. 8869, USCCA-7, October Term, 1945.

[2] *Ibid.* pp. 127, 133, 136, 150.

[3] Hull v. Stalter (USDC-ND-Ind.) 61 F. Supp. 732.

furnishes meager, if any, support for the court's statement. However, the record also discloses that the case, at the conclusion of the testimony, was argued by counsel for both sides and this argument, or the greater portion thereof, is omitted from the transcript. Under such circumstances we are unable to say that the court's statement is incorrect; in fact, we think that we must accept it.

"Moreover, we also have read the regulations and are of the view that this purposed concession on the part of the government was correct. We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by § 5 (h) of the Act, which provides that 'no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than at the time of registration. . . ."

In the Government's brief it is stated that there "are no issues of credibility, and there are no questions concerning the weight to be given various items of evidence." (Br. p. 29) It seems to be inconsistent to contend that Roisum was a draft evader in light of this statement.

The United States Circuit Court of Appeals in the *Rase* case quoted from by the Government (129 F. 2d 204) and several other courts have had occasion to pass upon the question of whether the particular members of Jehovah's witnesses involved constituted ministers of religion within the meaning of Section 5 (d) of the Act.[4] Not stopping to debate the propriety of the holding in those particular cases, it should be observed that certain erroneous principles were announced and certain discriminatory remarks concerning Jehovah's witnesses were made clearly indicating that the courts in considering the status of Jehovah's witnesses under Section 5 (d) of the Act have erroneously and unfairly applied the orthodox yardstick. If the courts in attempting to extract the intent of Congress as to what was a "minister of religion" within the meaning of the Act had not limited their perspective by the orthodox glasses but had looked at the ministerial missionary evangelistic work of Jehovah's witnesses through clear uncolored glasses of law they would have seen that all of Jehovah's witnesses who are regularly preaching the gospel are ministers of religion as much as the clergy of the orthodox religions who are properly recognized as ministers of religion under the Act and Regulations.

These courts have judged Jehovah's witnesses according to the standards of the orthodox religious denominations that have rigid creeds, ecclesiastical laws and traditional canons. These courts should not have compared the record made in these cases with the background of the personal religious experience of the judges of the courts that made the activity of Jehovah's witnesses appear exotic. If the

[4] United States v. Messersmith (CCA-7) 138 F. 2d 599; Rase v. United States (CCA-6) 129 F. 2d 204; Butecali v. United States (CCA-5) 130 F. 2d 172; United States *ex rel.* Altieri v. Flint (D. C. Conn.) 54 F. Supp. 889, aff'd 142 F. 2d 62 (CCA-2); *Ex parte* Stewart (D. C. Cal.) 47 F. Supp. 415; *Ex parte* Yost (D. C. Cal.) 55 F. Supp. 768; United States *ex rel.* Lawrence v. Commanding Officer (D. C. Neb.) 58 F. Supp. 933; Seele v. United States (CCA-8) 133 F. 2d 1015.

courts had employed a realistic approach they would have been driven to the conclusion that Jehovah's witnesses constitute a religious denomination and that their ministers are actually preaching, and thus come within the exemption intended by Congress to extend to all religious organizations.

Moreover, these courts, in the decisions rendered where these erroneous conclusions were reached, considered only tangentially the question of whether Jehovah's witnesses were entitled to claim the exemption. Most of those decisions did not require the court to pass upon the merit of the claim made before the draft boards by Jehovah's witnesses. In most of said opinions the courts decided the appeals in the criminal cases adversely to Jehovah's witnesses, holding that they were not entitled to challenge the legality of the classification given them because they had not exhausted their administrative remedies by reporting for induction. Accordingly, the discussion in those opinions, as to whether Jehovah's witnesses are ministers under the Act and Regulations, was wholly unnecessary to the decision made in each of those cases. Such discussions were *dicta*.

Conclusion

Petitioners respectfully submit that for the reasons above stated, and for the reasons disclosed in their main brief filed in these cases, the judgments of the circuit court of appeals should be reversed and the cases should be remanded to the district courts for further proceedings not inconsistent with the opinion of the Court that may be written herein.

HAYDEN C. COVINGTON

Counsel for Petitioners